BLANK

PAGE

FILE COPY

No. 447

Office - Supreme Court, U. S.
FILED
DEC 11 1937
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1937

SCHUYLKILL TRUST COMPANY, Appellant

v.

THE COMMONWEALTH OF PENNSYLVANIA

APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

SUPPLEMENTAL BRIEF FOR APPELLEE

CHARLES J. MARGIOTTI,
Attorney General

MANUEL KRAUS,
Deputy Attorney General

EDWARD FRIEDMAN,
Deputy Attorney General

Attorneys for Appellee

State Capitol,
Harrisburg, Pa.

BLANK

PAGE

INDEX

	Page
ARGUMENT	1
I. Tax in question is a tax on shares	3
(a) History of taxation of shares of bank stock	3
(b) History of taxation of shares of stock of trust companies	7
(c) Act of 1907, as amended, provides for a tax on the shareholders, not on the capital stock or property of the trust company. It charges the company as collector only	14

CASES AND STATUTES

Cases:

Bank of California National Association *v.* Richardson 248 U. S. 476	3
Commonwealth *v.* Curtis Publishing Co., 237 Pa. 333	18
Commonwealth *v.* Fall Brook Coal Co., 156 Pa. 488	18
Commonwealth *v.* Mortgage Trust Co., 227 Pa. 163	11-14, 18
Commonwealth *v.* N. Y. P. & O. R. R., 188 Pa. 169	4
Commonwealth *v.* Standard Oil Co., 101 Pa. 119	18
Commonwealth *v.* Union Trust Co., 237 Pa. 353	18
Farrington *v.* Tennessee, 95 U. S. 686	18
Home Savings Bank *v.* Des Moines, 205 U. S. 503	17
Merchants' & Manufacturers' National Bank of Pittsburgh *v.* Pennsylvania, 167 U. S. 461; 168 Pa. 309	14
Neiler & Warren *v.* Kelly, 69 Pa. 403	18
Northern Trust Co. *v.* McCoach, 215 Fed. 991, 994	16-18
Penna. Co. etc. *v.* Commonwealth, 22 W. N. C. 340	16
Schuylkill Trust Co., Appellant *v.* Commonwealth of Pennsylvania, 296 U. S. 113	1, 2, 16
Van Allen *v.* Nolan, 70 U. S. 573	18
Wilkes-Barre Deposit & Savings Bank *v.* Wilkes-Barre 148 Pa. 601	18

Page

Statutes:

Act of June 11, 1840, P. L. 612 3
Act of April 29, 1844, P. L. 486 4
Act of April 16, 1850, P. L. 477 4
Act of April 27, 1852, P. L. 443 4
Act of April 12, 1859, P. L. 529 4
Act of February 23, 1866, P. L. 82 4
Act of April 12, 1867, P. L. 74 5
Act of April 2, 1868, P. L. 55 5
Act of May 1, 1868, P. L. 108 ..... 4, 5
Act of December 22, 1869, P. L. 1373 5
Act of March 31, 1870, P. L. 42 6
Act of April 22, 1874, P. L. 109 6
Act of June 7, 1879, P. L. 112 6
Act of June 10, 1881, P. L. 99 6
Act of June 30, 1885, P. L. 193 6
Act of June 1, 1889, P. L. 420 6
Act of June 8, 1891, P. L. 229 7
Act of July 15, 1897, P. L. 292 7
Act of June 13, 1907, P. L. 640 ..... 3, 8
Act of July 11, 1923, P. L. 1071 12
Act of May 2, 1925, P. L. 497 7
Act of May 7, 1927, P. L. 853 12
Act of April 9, 1929, P. L. 343 13
Act of April 25, 1929, P. L. 673 ..... 3, 12
Act of April 25, 1929, P. L. 677 7

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 447

SCHUYLKILL TRUST COMPANY, Appellant

v.

THE COMMONWEALTH OF PENNSYLVANIA

APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

SUPPLEMENTAL BRIEF FOR APPELLEE

ARGUMENT

At the time of the oral argument in this court, permission was granted to the appellee to file a supplemental brief regarding the question raised as to whether the tax act in question is a tax on shares. This question was not dealt with in the original brief for the reason that it was always the Commonwealth's contention that the act in question imposed a tax on shares. In the case of SCHUYLKILL TRUST COMPANY, Appellant *v.* COMMONWEALTH OF PENNSYLVANIA, 296 U. S. 113, this question was dealt with at great length by the Commonwealth.

This court, in deciding that the amendments to the act of 1907, as construed and applied were discriminatory, did not directly pass upon the question as to whether the act of 1907 as amended was a tax on shares or a tax on the assets of the trust company, this court saying: "We think that the issue of discrimination is not to be resolved by a choice between the two contentions as to the nature of the tax" (R. 80).

In this brief, the Commonwealth will support its contention that the tax in question is a tax on shares, and that the discrimination complained of has been eliminated by the Supreme Court of Pennsylvania.

The opinion of the Supreme Court of Pennsylvania in the case of SCHUYLKILL TRUST COMPANY, Appellant *v.* COMMONWEALTH OF PENNSYLVANIA, in the first case, said, regarding the nature of the tax, "There was no infringement of the immunity from taxation of government securities for the reason that the tax here in question was levied upon the shares qua shares and not upon the assets of the corporation." (R 74).

May we again herein contend that the discrimination complained of by the Schuylkill Trust Company, has been removed; that the United States bonds, Philippine Islands bonds and Federal land bank bonds of the appellant have been treated exactly the same as the Pennsylvania shares; that the judgment of the Supreme Court of Pennsylvania, in applying and construing the act of 1907 as amended by allowing the deduction of United States securities to the same extent as shares of Pennsylvania corporations, has removed the discrimination against such

United States securities and complied with the mandate of this court.

As indicated by the record on page 15, the original settlement did not allow any deduction for United States securities. The assets for which a proportionate deduction was allowed are indicated on page 18 of the record. The latest judgment of the Supreme Court of Pennsylvania, which affirmed the judgment of the Court of Common Pleas of Dauphin County allowed a full deduction for national bank shares on the theory of the case of BANK OF CALIFORNIA NATIONAL ASSOCIATION *v.* RICHARDSON, 248 U. S. 476, and a proportionate deduction for United States securities equal to that of Pennsylvania shares as indicated on page 154 of the record, thereby treating United States securities the same as Pennsylvania shares, eliminating the discrimination complained of.

I. Tax in Question is a Tax on Shares.

The tax involved in this case is a tax imposed by the Act of June 13, 1907, P. L. 640, as last amended by the Act of April 25, 1929, P. L. 673 (72 PS Secs. 1991, 2001, 2002, 2011). In order to fully present the nature of this tax, it is important to present briefly the history of the taxation of banks in Pennsylvania, a tax which has a very close relationship to the tax on the shares of trust companies, and then to present briefly the history of the legislation with respect to the taxation of trust companies.

(a) History of Taxation of Shares of Bank Stock.

The Act of June 11, 1840, P. L. 612, Sec. 1, a general revenue act, was the first act in Pennsylvania taxing bank

stock. The tax imposed was on the capital stock of banks. The tax was payable by the bank's officers, out of dividends declared. This was repealed by Act of 1868, P. L. 108, below.

The Act of April 29, 1844, P. L. 486, Secs. 32 and 33, followed this. It specifically provided that the tax, also on the capital stock, was payable out of the funds of the company. If no such funds were available, then it became the stockholders' duty to pay. It was repealed by Act of 1868, P. L. 108, below.

The Act of April 16, 1850, P. L. 477, Sec. 46, replaced the Act of April 29, 1844, and imposed a tax on the bank's capital stock.

The Act of April 27, 1852, P. L. 443, provided that the act of 1844 be applicable to all banks, with respect to the tax on capital stock.

The Act of April 12, 1859, P. L. 529, referred to Sec. 33 of the act of 1844, above, and provided that the capital stock be taxed only if there were no dividends, which were primarily taxed. It was repealed by Act of 1868, P. L. 108, below.

The Act of February 23, 1866, P. L. 82, was the first act taxing national bank stock. It made it the duty of the cashier of every bank, state or national, to collect a tax from every shareholder, whereupon the capital stock was exempted from further taxation. This act was construed as doing away with the taxing of the capital stock of banks: COMMONWEALTH *v.* N. Y., P. & O. R. R., 188

Pa. 169. It was held unconstitutional because conflicting with the Act of Congress on taxation of shares of stock of national banks.

The Act of April 12, 1867, P. L. 74 (72 PS Secs. 1911, 1933, 1934), taxed all shares of national bank stock in the hands of the holders of such shares.

Then followed the Act of April 2, 1868, P. L. 55 (72 PS Secs. 1935, 1937, 1971), which supplemented the act of 1867, with respect to appraisement of the stock, assessors, etc. It provided in section 49 (72 PS Sec. 1971), that taxes assessed thereunder should be a lien on the shares, and, in case of nonpayment, the shares of defaulting stockholders were made subject to attachment, levy, and sale. This act is still in force.

The Act of May 1, 1868, P. L. 108, was for the purpose of revising, amending, and consolidating the laws taxing corporations, bankers and brokers. It repealed the acts of 1840, 1844, and 1859, supra. By section 10 (72 PS Sec. 1912), it imposed a tax on shares of banks and savings institutions. It is still in force.

The Act of December 22, 1869, P. L. (1870) 1373 (72 PS, Sec. 1981), extended application of the act of 1867 and its supplement, the act of 1868, supra, to banks incorporated in Pennsylvania, and provided that those banks be subject to the same tax as national banks under the acts of April 12, 1867, and April 2, 1868. It is still in force, except its third section.

The Act of March 31, 1870, P. L. 42 (72 PS Sec. 1962), which contained a similar provision that if the bank elect to collect annually from its shareholders 1% of the par value of all shares, the three mill tax on the stock need not be paid. This act is still in force. (Also 72 PS Sec. 4764.)

The Act of June 7, 1879, P. L. 112, was a general revenue act, providing for various taxes. By section 17 it provided, apparently separately, for a tax on shares of bank stock, state and national. It was repealed by the Act of June 30, 1885, below.

The Act of June 10, 1881, P. L. 99, also provided for a tax on shares of bank stock, and by section 3, it exempted the capital of banks from further taxation, if they collected the tax from their shareholders.

The Act of June 30, 1885, P. L. 193 (72 PS Sec. 1913), entitled "A further supplement" to the act of June 7, 1879, supra, impliedly repealed this and the act of 1881, and taxed all stock "* * * and all other moneyed capital in the hands of individual citizens of the State, * * *" and restricted the taxation to that for State purposes. It rephrased the exemption provision, providing that "* * * the shares and so much of the capital and profits of such bank, * * *" should be exempt from all other taxation if the bank collected from the stockholders. Upon failure to pay, the Auditor General could settle accounts against the shareholders (Sec. 5).

Following this came the Act of June 1, 1889, P. L. 420, a supplement to the general revenue act of June 7, 1879, supra, taxing capital stock of corporations except

banks, etc. It gave them exemption from local taxation upon collecting the tax from their shareholders (sec. 25), failing which, and failing payment by the banks, accounts could be settled against the shareholders.

The Act of June 8, 1891, P. L. 229, also entitled as a supplement to the act of June 7, 1879, amended the act of 1889, and substantially reenacted the former amendment, and provided for exemption of state and national bank shares and capital from local taxation upon collection of the tax from their shareholders.

The Act of July 15, 1897, P. L. 292, was the last general act on the taxation of shares of bank stock. As first amended by the Act of May 2, 1925, P. L. 497, and again amended by the Act of April 25, 1929, P. L. 677, it provides (72 PS Secs. 1931, 1932, 1951 and 1961) for assessment of the shares for taxation; for the collection of the tax from the shareholders, or, at its option for payment by the bank, and in the former case for the exemption from local taxation.

(b) History of Taxation of Shares of Stock of Trust Companies

We have presented the history of the taxation of the shares of stock of banks of Pennsylvania not only because of the analogy to be drawn from some of these acts, but also because some of the acts of assembly previously referred to which are still in force, apply also to trust companies.

The acts of June 11, 1840 and April 29, 1844, aforementioned, were not restricted to "banks"; therefore trust companies were covered by their provisions. The acts subsequent to these, which we have referred to, were restricted to "banks and savings institutions." The change made by the act of February 23, 1866, supra, with respect to banks, did not apply to trust companies. Trust companies were left subject to a capital stock tax. This situation continued until the act of June 30, 1885, a supplement to the act of 1879, as previously referred to. This act (sec. 2) was extended to "all shares of stock in any bank, banking or saving institution or company, safe deposit, guarantee, surety and real estate, title insurance or trust company * * *". Trust companies could thereafter elect to collect the tax from their shareholders, and by so doing became exempt from all other taxation, which meant capital stock tax.

Under the act of June 1, 1889, supra, trust companies were again left to pay a capital stock tax, because that act restricted the election above referred to, to banks and savings institutions. The act reverted to the original status of taxation of trust companies. Likewise, the acts of June 8, 1891 and July 15, 1897, supra, were restricted to banks.

The Act of June 13, 1907, P. L. 640, expressly provided for the taxation of the shares of stock of "title insurance or trust companies." This act (with its amendments) is the important act for consideration in this case. After providing that every title insurance, or trust, company, incorporated under a certain Pennsylvania act, shall each year on or before the 20th day of June, make a report to the Auditor General, "setting forth the full num-

ber of shares of the capital stock subscribed for or issued by such company, and the actual value thereof, which shall be ascertained as hereinafter provided," it imposed the duty on the Auditor General:-

> * * * **to assess such shares** for taxation at the rate of five mills, upon each dollar of the actual value thereof, the actual value of each share of stock to be ascertained and fixed by adding together the amount of capital stock paid in, the surplus and undivided profits, and dividing this amount by the number of shares * * *. (Boldface ours)

The Auditor General is given the right, if he is not satisfied of the correctness of the report made to him "on the question of the value of the shares of stock of such company," to examine into the evidence presented. It is further provided that after the Auditor General shall have fixed **"the value of the shares of stock of any such company"** as provided, and has settled an account according to law, he shall transmit to the president, cashier or treasurer of such company, a copy of such settlement of the tax due the Commonwealth **"on all such shares".** Thereupon, it becomes the duty of the president, secretary or treasurer to post the same in a conspicuous place in such company's place of business **"so as to give notice to the shareholders of such valuation; and it shall be the duty of the Auditor General to hear any shareholder upon the subject of valuation of such shares of stock,** at the Auditor General's office, within a period of thirty days from the date of such settlement."

It is the duty of the company, within forty days after the settlement, "at its option," to pay said tax "from its general fund, or collect the same from its shareholders and

pay over to the State Treasurer." If the company fails or refuses to make such report, or to pay such tax, the Auditor General is required "after having ascertained the actual value of each share of the capital stock of such company from the best information he can obtain," to add fifty per centum as a penalty to the tax and collect it from the company. Further, if the president, cashier or treasurer of the company neglects or refuses to post the required notice, such officer is to be adjudged to be in default and as a penalty therefor, "such company shall be responsible to the Commonwealth for the amount of the tax assessed against the stockholders of such company."

It further provided an optional or alternative method of ascertaining and fixing the value of the shares for the purposes of this tax, in the event the company collected and paid the same on or before March 1st in each year, as follows:

> * * * In case any such company shall collect annually from the shareholders thereof, or from the general fund of said company, said tax of five mills on the dollar upon the value of all the shares of stock of said company, the value of each share of stock to be ascertained and fixed by adding together **so much** of the capital stock paid in, the surplus, and undivided profits **as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax or tax on shares,** and dividing this amount by the number of shares of such title insurance or trust company, and pay said tax into the State Treasury, on or before the first day of March in each year, the shares, and so much of the capital stock, surplus, profits, and deposits of such company as shall not be invested in real estate, shall be exempt from all other taxation

under the laws of this Commonwealth. (Boldface ours)

Although the act of 1907 speaks in the title and in the body of the act of the tax imposed as a tax on shares, it is admitted that this fact alone does not determine the nature of the tax. However, from the brief details of the act just given, it will readily be seen that at each step in the reporting, ascertaining, fixing and collecting of the tax, we are dealing with a tax on shares.

In COMMONWEALTH v. MORTGAGE TRUST CO., 227 Pa. 163 (1910), the Supreme Court said at page 175:

> * * * The policy of the commonwealth for more than twenty years was to tax the capital stock of these companies in the same manner as other corporations created under the general corporation act of 1874 were taxed. They made their reports to the auditor general under the general revenue acts of 1879, 1889 and 1891, and other statutes, just as other private corporations did, and the valuation of their capital stock was ascertained and the tax settlement made upon the same basis. This method of taxing the capital stock of these institutions continued in force until the act of 1907 was passed. As the trust company business grew in magnitude, as it did grow after the passage of the act of 1895 which conferred quasi banking privileges, the question of the proper method of taxing the capital stock of these corporations frequently arose. It was contended in their behalf that banks were their natural competitors; that their business partook of the nature of banking; and that they should be taxed in like manner. As a result of this feeling and the agitation which followed it the act of 1907 was passed. It is apparent that the legislature intended to tax trust companies on the same basis as banks. * * *

The act of 1907 was first amended by the Act of July 11, 1923, P. L. 1071. This act, among other things, changed the time of the filing of the report, and the date for the ascertainment of the value of the shares was made "as of December 31 preceding." Relative to ascertaining and fixing the tax it provided that the duty of the Auditor General should be

> * * * to assess such shares for taxation at the rate of five mills upon each dollar of the actual value thereof, the actual value of each share of stock to be ascertained and fixed by adding together *so much of* the amount of capital stock paid in, the purplus, and undivided profits *as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax or tax on shares,* and dividing this amount by the number of shares. * * * (Italics ours)

The italics are amendments of the act of 1907 made by the act of 1923. The other amendments were minor and have no bearing on the questions involved.

The act of 1907 was again amended by the Act of May 7, 1927, P. L. 853. This act amended the provision above quoted in the act of 1923 by adding the words "or relieved from the payment of capital stock tax" following the words "liable to pay to the Commonwealth a capital stock tax."

The act of 1907 was also specially amended by the act of April 25, 1929, P. L. 673, by changing the time for the filing of the reports and by substituting "Department of Revenue" wherever "Auditor General" had appeared in the old act of 1907 as amended. An amendment was

also made by striking out the provision requiring the Auditor General (now Secretary of Revenue), after making his settlement, to transmit to the president, secretary, or treasurer of such company, a copy of such settlement showing the valuation and assessment so made and the amount of the tax due the Commonwealth, and thereupon making it the duty of said president, secretary, or treasurer to immediately post the same in a conspicuous place in such company's place of business so as to give notice to the shareholders of such valuation, and requiring the Auditor General (now Secretary of Revenue) to hear any shareholders on the subject of the valuation of such shares during a period of thirty (30) days from date of settlement. These provisions were stricken out because they were incorporated in Section 807 of The Fiscal Code of April 9, 1929, P. L. 343. The act of April 25, 1929 amended the act of 1907 by striking therefrom the proviso which had to do with the failure or refusal of the trust company to make the report required, and also the proviso which had to do with the requirement placed upon the president, secretary, or treasurer of the company to post the notice of the settlement as aforementioned. These two latter provisos were also stricken out because they were incorporated in section 1705 of The Fiscal Code of 1929.

Thus the act of 1907 and its amendments fully provided for an assessment of a tax against the shares and the payment of the tax by the company from its general fund or collection by it from its stockholders,—as in the case of the tax on shares of bank stock. Accordingly, while from 1889 to 1907 banks and trust companies diverged with respect to stock taxes, the act of 1907 and

its amendments have substantially brought them together again.

The history of much of this legislation was also traced by Mr. Justice Elkin in COMMONWEALTH v. MORTGAGE TRUST COMPANY, 227 Pa. 163 (1910).

(c) Act of 1907, as amended, Provides for a Tax on the Shareholders, Not on the Capital Stock or Property of the Trust Company. It Charges the Company as Collector Only

Although the tax on bank stock started out as a capital stock tax, since the act of February 23, 1866, previously referred to, the tax has consistently been assessable on the shares of stock in the hands of the stockholder. The act of 1891 provided an alternative method whereby any bank or savings institution incorporated by this State or by the Federal Government, could collect from the shareholders and pay into the State Treasury a tax of eight mills on the par value of its shares in lieu of all taxation except upon its real estate; upon failure so to elect to pay a tax upon the par value of the shares, it was made subject to a tax of four mills on the actual value of its shares of capital stock, without any exemption. As pointed out by Mr. Justice Elkin in COMMONWEALTH v. MORTGAGE TRUST COMPANY, supra, notwithstanding the inequalities that appear in this, the United States Supreme Court held this tax to be constitutional as a tax on shares in MERCHANTS' & MANUFACTURERS' NATIONAL BANK OF PITTSBURGH v. PENNSYLVANIA, 167 U. S. 461 (1896), affirming 168 Pa. 309. The following language of the United States Supreme Court in that case, at page 465, is pertinent:

> It is further insisted that the act is really one taxing the bank, and not taxing the shares of stock as the property of the stockholders; but this is obviously a misinterpretation of the statute. That simply makes the bank the agent to collect from the stockholders the tax imposed upon the shares. The language of section 7 in this respect is clear, for it provides that the national bank which fails to elect to collect and pay the 8 mills shall make a report to the auditor general "setting forth the full number of shares of the capital stock issued by such national bank, and the actual value thereof, whereupon it shall be the duty of the auditor general to assess the same for taxation," * * *

Likewise, with respect to trust companies, between 1885 and 1889, and from 1907 to the present time, the tax has been assessable on the shares of stock in the hands of the stockholders. None of the acts, since the tax was assessed on the shares, contained any provisions for collection, upon failure to pay, out of the general funds of the bank or trust company. On any such failure the State officials are to settle accounts with the shareholders.

The only legislative provisions for such taxes to become liens, upon nonpayment, were contained in the act of 1844, supra, which provided for subjection of the property of the corporation to levy; but this is of no importance, because the tax was then still a capital stock tax. The act of 1868, supra, which is still in force, provides that the tax shall become a lien on the shares (72 PS Sec. 1971).

The act of 1897, supra, did impose on the bank a penalty of ten percent of the tax for failure to make a return.

But, as Mr. John G. Johnson pointed out in his argument in PENNA. CO. ETC. V. COMMONWEALTH, 22 W. N. C. 340 (1888), that must have been a mistake of the draftsman of the act, because in fact the act imposed no tax on the bank. He also pointed out another error in drafting the act; the date of return of names of the individual stockholders was made to precede the date of election of the bank to pay the tax or collect from its stockholders. In support of his contention that these were errors, he pointed out that both were speedily corrected by the act of 1881. Thereafter, no penalties were imposed on the banks for the obvious reason, as indicated by Mr. Johnson, that the tax was not imposed on the bank itself but on the shares of stock in the hands of the holders.

The tax in question here is a tax assessed against the property of the individual and not against the corporation or property of the corporation. This has been decided in connection with attempts of trust companies to deduct the amount of the tax from their assets in ascertaining their net taxable income under Federal taxation laws: NORTHERN TRUST CO. V. MCCOACH, 215. Fed. 991 (1914).

The court in that case in discussing the Trust Company Act of 1907 saying that the tax imposed by the State of Pennsylvania, by the act of assembly referred to is a tax imposed upon the property of the individual stockholders and not upon the corporation or its property and because of this, the amount of payment is not to be deducted from the gross income of the corporation in determining the taxable net income.

In HOME SAVINGS BANK v. DES MOINES, 205 U. S. 503 (1907), the United States Supreme Court in discussing a tax upon the owners of the shares of stock in a corporation, said (p. 518):

> * * * The tax assessed to shareholders may be required by law to be paid in the first instance by the corporations themselves, as the debt and in behalf of the shareholder, leaving to the corporation the right to reimbursement for the tax paid from their shareholders, **either under some express statutory authority for their recovery or under the general principle of law that one who pays the debt of another, at his request, can recover the amount from him.** First Nat. Bank v. Kentucky, 9 Wall. 353, 19 L. ed. 701; Lionberger v. Rouse 9 Wall. 468, 19 L. ed. 721; First Nat. Bank v. Chehalis County, 166 U. S. 440, 41 L. ed. 1069, 17 Sup. Ct. Rep. 629; Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; Cleveland Trust Co. v. Lander, 184 U. S. 111, 46 L. ed. 456, 22 Sup. Ct. Rep. 394. The theory sustaining these cases is that the tax was not upon the corporations' holdings of bonds, but on the shareholders' holding of stock; and an examination of them shows that in every case the tax was assessed upon the property of the shareholders, and not upon the property of the corporation. * * * (Boldface ours)

Pennsylvania does not require its banks and trust companies to advance the tax. It gives the corporation an option of either (a) collecting the tax from its shareholders or (b) paying the amount from its own funds. If it does not choose to pay the tax, the corporation has the responsibility of collecting it. The exercise of the option by the trust company to pay the tax makes the tax

imposed no less a tax on shares in the hands of the shareholders. The option in the act "is strictly an option of payment not of obligation": NORTHERN TRUST COMPANY v. McCOACH, 215 Fed 991, 994 (1914).

A tax on shares is not a tax on the capital stock property, or franchises of a corporation. It is in no sense a tax on the corporation. It is a personal levy on the shareholders, based on the value of their stock as ascertained by a definite method prescribed in the act of assembly, and without any intent to reach the property that gives the stock its value: NORTHERN TRUST COMPANY v. McCOACH, 215 Fed. 991 (1914); COMMONWEALTH v. UNION TRUST Co., 237 Pa. 353 (1912); COMMONWEALTH v. MORTGAGE TRUST Co., 227 Pa. 163 (1910).

Capital stock represents the property in which it is invested, so is taxable to the corporation which holds title to the property. COMMONWEALTH v. STANDARD OIL Co., 101 Pa. 119 (1882). The shares, on the other hand, are evidences of a right to participate in the profits of a corporation, and, upon its dissolution, to participate in the division of its assets: COMMONWEALTH v. FALL BROOK COAL Co., 156 Pa. 488 (1893); VAN ALLEN v. NOLAN, 70 U. S. 573 (1866). The capital stock and the shares are different subjects of taxation, and are owned by different entities: COMMONWEALTH v. STANDARD OIL Co., supra; WILKES-BARRE DEPOSIT & SAVINGS BANK v. WILKES-BARRE, 148 Pa. 601 (1892); NEILER & WARREN v. KELLY, 69 Pa. 403 (1871); COMMONWEALTH v. CURTIS PUBLISHING Co., 237 Pa. 333 (1912); FARRINGTON v. TENNESSEE, 95 U. S. 686 (1877).

The character of the tax as a levy upon the property of the shareholders was well understood by the legislature, and it was careful that the impost should not fail for violation of any of their constitutional rights. Thus it was provided that notice to shareholders should be given by the posting of notice of assessment in the company's place of business,—this, to afford process of law. It is also provided, as previously mentioned, that the Auditor General (now the Secretary of Revenue) shall give a hearing to any stockholder who wishes to protest the assessment made. These provisions were formerly in the act of 1907 itself, but being matters of procedure, they were later incorporated in section 807 of The Fiscal Code of April 9, 1929, P. L. 343.

If this were a tax on the property of a corporation, then why should the act provide that notice to shareholders should be given by posting of the notice of assessment in the company's place of business? This we believe is done to the end of due process of law.

Consequently, the conclusion of the court below that the tax in question under the act of 1907, as amended by the acts of 1923, 1927 and 1929 is a tax on shares in the hands of the shareholders and is fully supported by the decided cases.

Respectfully submitted,

CHARLES J. MARGIOTTI,
Attorney General

MANUEL KRAUS,
Deputy Attorney General

EDWARD FRIEDMAN,
Deputy Attorney General

BLANK

PAGE

SUPREME COURT OF THE UNITED STATES.

No. 447.—October Term, 1937.

Schuylkill Trust Company, Appellant, *vs.* The Commonwealth of Pennsylvania. } Appeal from the Supreme Court of the Commonwealth of Pennsylvania.

[January 3, 1938.]

Mr. Justice Roberts delivered the opinion of the Court.

In *Schuylkill Trust Company* v. *Pennsylvania*, 296 U. S. 113, we held an act of Pennsylvania[1] invalid as construed and applied in the calculation of the amount of the tax thereby imposed. The statute requires every trust company chartered under the general corporation law to report annually to the Department of Revenue the number of outstanding shares and their actual value at the close of the preceding calendar year. The department is to assess the shares for taxation at five mills upon the dollar. The taxable value of each share is to be ascertained by adding together so much of the amount of paid-in capital stock, surplus, and undivided profits as is not invested in shares of corporations liable to pay or exempted from payment of the Pennsylvania capital stock tax, or relieved from the payment of a tax on shares, and dividing this amount by the number of shares. The company must pay the tax from its general fund within sixty days after assessment, or collect it from the shareholders and pay it over. Provision is made for posting notice of the assessment in the company's office so that shareholders shall be advised of the amount of the assessment and for a hearing of any shareholder who objects to the valuation of the shares.[2]

Securities owned by a trust company may have been purchased out of deposits or from the capital, surplus, and undivided profits. Since securities, the value of which is by the act deductible from the tax base, may have been purchased out of either of the two funds, it is open to the company to prove that they or any of

[1] Act of June 13, 1907, P. L. 640, as amended by the acts of July 11, 1923, P. L. 1071, May 7, 1927, P. L. 853, and April 25, 1929, P. L. 673.

[2] Act of April 9, 1929, Sec. 807, P. L. 393.

them were purchased out of capital, surplus, or undivided profits. Upon such a showing these securities are fully exempt from tax. Where the company has not made this showing the practice in assessing the tax has been to grant a so-called proportionate deduction in respect of such exempt securities.[3] This is accomplished by the use of the following formula: A fraction, the numerator of which is the capital, surplus, and undivided profits at book value less the book value of those investments, if any, for which a full deduction has been made, and the denominator, the book value of the permanent investments, less the book value of those investments, if any, for which a full deduction has been made, is applied to the book value of the securities which are to be apportioned, after adjustment for appreciation or depreciation of those securities, and the resulting sum is deducted from the capital, surplus, and undivided profits. In this manner a portion of the value of each exempted security reflected in the capital, surplus, and profits is deducted before the value per share is determined by dividing the capital surplus and profits so diminished by the number of shares outstanding.

Upon the former appeal it was shown that whereas a proportionate deduction was allowed for shares of Pennsylvania corporations previously taxed, or shares of such corporations exempt from tax, no deduction was accorded in respect of shares of a national bank and bonds of the federal government and its instrumentalities owned by the company. The appellant's position was that the act, though it purported to tax the shares, in fact taxed the net assets of the company which included shares of stock of a national bank and securities of the federal government and its instrumentalities owned by the appellant. An alternative claim was that, if the levy was upon the shares as such, the application of the act worked a discrimination against national bank shares and other federal securities by excluding from the base a proportionate part of the value of shares of certain Pennsylvania corporations while leaving in the base national bank shares and federal securities; and that, if the tax was upon the shares, it was bad as the Commonwealth was without power to tax the shares of nonresident stockholders. The Commonwealth insisted the tax was upon the shares and not upon assets, that the application of the statute involved no dis-

[3] See Commonwealth v. Haselwood Savings & Trust Co., 271 Pa. 375.

crimination against federal securities and that the State had jurisdiction to tax the shares of nonresident shareholders.

We found it unnecessary to determine whether the tax was upon shares or assets. Amongst the assets were shares of national bank stock which had been taxed to the company as owner, pursuant to R. S. 5219 as amended.[4] These we held must be excluded from the base upon which the tax was calculated. We held further that the exclusion from the base of a proportion of the value of tax exempt shares of Pennsylvania corporations, and the refusal of like treatment of federal securities, operated as an unconstitutional discrimination against the latter. We reversed the judgment of the Supreme Court of Pennsylvania and remanded the cause for further procedings not inconsistent with our opinion.

After our mandate went down the Commonwealth moved the trial court to redetermine the tax by disregarding the amendatory statute involved in our decision and reverting to the basic act of June 13, 1907,[5] which was claimed not to be affected by the infirmity of the amendatory act. The appellant insisted that as we had set aside the judgment and held the amendatory act of April 25, 1929,[6] invalid as construed and applied, the only action open to the trial court was the entry of a judgment for the appellant. The court refused to follow either of the suggested courses, holding that the legislature, by the act of 1929, intended to exercise only such power as it lawfully possessed and did not attempt to impose a tax upon securities exempted by federal law. It found that the purpose of the statute could be accomplished by eliminating the national bank shares from the tax base and by treating the other federal securities in the same manner as tax exempt stock of state corporations. It accordingly recalculated the tax. The appellant took the case to the Supreme Court of the Commonwealth which affirmed the judgment.[7]

By appropriate exceptions and assignments of error the appellant challenges the new judgment upon these grounds: that the courts below have disregarded the mandate of this court and have exceeded their powers in reassessing the tax; that the tax is one upon assets and not upon shares, and federal securities are left in

[4] U. S. C. Title 12, § 548.
[5] *Supra*, Note 1.
[6] *Supra*, Note 1.
[7] 327 Pa. 127.

the tax base as to at least a portion of their value; that, if the tax is upon the shares rather than upon the assets, there is still a discrimination against federal securities because the stockholders of appellant and other similar corporations are wholly exempted from any tax calculated upon the value of the shares of national banks whereas at least a portion of the value of other federal securities still remains in the tax base; and that, in any event, the impost is bad so far as it is laid upon the shares of nonresident shareholders. The Commonwealth argues that the tax is upon the shares as such and not upon assets; that in assessing it no discrimination is practiced against federal securities and in favor of the exempted stock of Pennsylvania corporations and that, if the tax is otherwise valid, the fact that it is laid upon all shareholders, including nonresidents, does not void it as respects the latter.

First. When the case was previously heard we held the statute invalid as construed and applied and remanded the cause for further proceedings not inconsistent with our opinion. It is clear that the State courts were not precluded from construing the statute so as to eliminate the unconstitutional features. It follows that the appellant was not entitled, as a matter of right, to a general judgment in its favor exempting it from all tax.

Second. The contention that the State courts really have not construed the act but have themselves amended it, and that this is judicial legislation forbidden by the constitution of Pennsylvania, is not open here. As the trial court pointed out, courts, in applying a statute, general and sweeping in its terms, may construe it as not intended to reach subjects which, by reason of constitutional prohibition, the legislature is without power to touch. Whether the courts of the Commonwealth exceeded their powers under the state constitution is not a federal question. We accept their construction of the act.

Third. As the case is now presented, we find it necessary to determine whether the tax is upon the shares as such or upon the capital, surplus, and profits of the company. The statute on its face lays the tax upon the property of the stockholder, represented by the shares he owns. The state courts, and the local federal court, have held the imposition a tax upon the shares.[8] The history

[8] Schuylkill Trust Co. *v.* Commonwealth, 315 Pa. 429; Commonwealth *v.* Mortgage Trust Co., 227 Pa. 163, 174; Commonwealth *v.* Union Trust Co., 237 Pa. 353, 355; Northern Trust Co. *v.* McCoach, 215 Fed. 991.

of legislation respecting taxation of banks and trust companies in Pennsylvania leads to the same conclusion.[9] We are of opinion that the tax is one upon the shares as such and not upon the assets of the company.

Fourth. The State need not have made any exemption or concession in taxing the property in the shares on account of value therein reflected from the company's ownership of obligations of the government or its instrumentalities other than national bank stock.[10] And the discrimination found upon the earlier appeal in failing to accord proportionate exemption to federal securities similar to that extended to exempt shares of domestic corporations has been removed, for all are now accorded like treatment by way of deduction.

Fifth. The fact that the shareholders of a trust company whose investments consist of national bank stock would pay no tax, because R. S. 5219 permits but a single tax thereon which has been paid by the company as owner, whereas those holding shares in a trust company which owns only other federal securities would not

---

[9] As early as 1867 [Act of April 12, 1867, P. L. 74] Pennsylvania imposed a tax on the shares of national bank stock in the hands of the holders. See also Act of April 2, 1868, P. L. 55; Act of May 1, 1868, P. L. 108, Sec. 10. It also taxed the shares of state banks. Act of December 22, 1869, P. L. [1870] 1373; Act of June 10, 1881, P. L. 99; Act of June 30, 1885, P. L. 193; Act of June 8, 1891, P. L. 229, (the last named act was sustained in Commonwealth *v.* Merchants & Manufacturers National Bank, 168 Pa. 309; affirmed 167 U. S. 461); Act of July 15, 1897, P. L. 292, amended by Act of May 2, 1925, P. L. 497, and Act of April 25, 1929, P. L. 677. Some of the earlier of these acts provided for the taxation of the shares of trust companies upon the same basis as shares of banks were taxed, but by the Act of June 1, 1889, P. L. 420, trust companies were made liable for a so-called capital stock tax which is in fact a tax upon assets and no tax was levied upon the shares in such companies. The Act of 1907 (*supra*, note 1) was passed in order to conform taxation applicable to trust companies with that then current with respect to banks. As stated in Commonwealth *v.* Mortgage Trust Company, 227 Pa. 163, 175: "The policy of the commonwealth for more than twenty years was to tax the capital stock of these companies in the same manner as other corporations created under the general corporation act of 1874 were taxed . . . . This method of taxing the capital stock of these institutions continued in force until the act of 1907 was passed. As the trust company business grew in magnitude . . . the question of the proper method of taxing the capital stock of these corporations frequently arose. It was contended in their behalf that banks were their natural competitors; that their business partook of the nature of banking; and that they should be taxed in like manner. As a result of this feeling and the agitation which followed it the act of 1907 was passed. It is apparent that the legislature intended to tax trust companies on the same basis as banks."

[10] Van Allen *v.* The Assessors, 3 Wall. 573; National Bank *v.* Commonwealth, 9 Wall. 353, 359; Cleveland Trust Co. *v.* Lander, 184 U. S. 111; Des Moines National Bank *v.* Fairweather, 263 U. S. 103.

be entitled to a similar total exemption but only to a proportionate deduction unless it could be shown that those securities were purchased from capital, surplus, and undivided profits, does not evidence an illegal discrimination against such securities. The inability of a state to measure a tax by certain assets exempted by federal law does not preclude it from reckoning in the tax base all those it can reach. And the principle of equal protection does not demand that because one company owns wholly exempt securities, with consequent exemption of its shareholders from the exaction, the state shall abstain from taxing the shareholders of another company whose investments carry no such exemption.

Sixth. The State courts have held that nonresident as well as resident shareholders are within the scope of the statute, and we are bound by this construction. The appellant argues that as thus applied the statute would take their property without due process and deny them equal protection in violation of the Fourteenth Amendment of the Constitution of the United States since the taxing power of Pennsylvania is limited to persons and property within her jurisdiction. The contention was overruled by the State Supreme Court, and we think rightly so, upon the authority of *Corry* v. *Baltimore*, 196 U. S. 466. There this court held that under a similar statute Maryland and its municipal subdivisions could impose a levy for revenue upon nonresident shareholders measured by the value of their shares in a domestic corporation. The distinctions between that case and this, to which the appellant points, are not significant. In reliance upon *Tappan* v. *Merchants' National Bank*, 19 Wall. 490, wherein we held it competent for the United States to provide by a statute which became part of the charter of every national bank that the shares shall be taxable to the shareholders by the state wherein the bank is located, the court proceeded, in the *Corry* case, to the proposition that where a state statute made similar provision for the taxation of the shares of nonresident stockholders at the home of a domestic corporation, the legislation did not violate the Fourteenth Amendment.[11] There the corporation was made liable for the payment of the tax and given a right of reimbursement over against

[11] The case has been cited repeatedly with approval. Covington v. First National Bank, 198 U. S. 100, 112; Hawley v. Malden, 232 U. S. 1, 12; Rogers v. Hennepin County, 240 U. S. 184, 191; Rhode Island Trust Co. v. Doughton, 270 U. S. 69, 81.